TABLE OF APPENDICES

Page

Appendix A – 47 U.S.C. § 227 ..... 1a

Appendix B – 28 U.S.C. § 1658 ..... 24a

STATUTORY PROVISIONS INVOLVED

The full text of 47 U.S.C. § 227, which includes mechanisms for enforcement in addition to the provision empowering States to permit a private right of action to be brought in their courts, is attached hereto at Appendix A. The text of 28 U.S.C. § 1658 is attached hereto at Appendix B.

SUMMARY OF REASONS FOR DENYING THE PETITION

This case arises out of an action brought in Texas state court before September 1, 1999, alleging that Respondents, among others, were responsible for transmitting unsolicited fax advertisements to Petitioners in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The sole vehicle for private enforcement under the TCPA is found in § 227(b)(3), which authorizes private parties to bring suit in "an appropriate court of [a] State" only "if otherwise permitted by the laws or rules of court of [that] State." *Id.* The Texas Supreme Court held that, because Texas did not "otherwise permit" or consent to such private rights of action being brought in its state courts before September 1, 1999, Petitioners failed to state a claim under the TCPA.

In their petition, Petitioners identify three questions that they would like for this Court to reconsider. In the first question presented, Petitioners argue that this Court should reconsider the issue of what action, if any, a state must take to permit private TCPA claims to be brought in its courts. In the second, they frame a question regarding whether Congress may constitutionally delegate to the States the decision whether to permit private TCPA claims to be brought in their courts. Finally, in the third question presented, Petitioners argue that the Texas intermediate court improperly applied Texas's two-year statute of limitations to the claims at issue. None of these issues is worthy of this Court's review.

First, the class of persons affected by the Texas Supreme Court's decision is, with the exception of Petitioners in this case, a null set. This is because there is no dispute that, since September 1, 1999, parties have been authorized by the Texas Legislature to bring private TCPA claims in Texas courts. Indeed, Petitioners themselves conceded before the Texas Supreme Court that the first question presented is "no longer important to cases filed in the last five years" in Texas. *See* Chair King Response to GTE's Brief on the Merits 22, *GTE Mobilnet of Houston, Inc. v. Kosoy*, No. 04-0570 (Tex. filed Jan. 17, 2005) ("Chair King Br.").

Second, even as to parties outside the State of Texas, Petitioners point to no state where parties are prohibited from bringing private TCPA claims in that state's courts. Simply stated, Petitioners have identified no purported unsolicited fax recipients, other than themselves in this case, who have been negatively affected by the Texas Supreme Court's decision in this case. The petition should be denied on this ground alone.

Third, Petitioners greatly overstate the nature of the split of authority on the first question presented. At most, there is a 4-1 split of authority among state courts of last resort (and federal appellate courts) on the issue, with the Texas Supreme Court's decision standing alone and without consequence, as explained above.

Fourth, although Petitioners include in their petition a second and related question regarding Congress's authority to delegate to the States the decision whether to permit private TCPA claims to be brought in their courts, Pet. *i*, they do not provide any explanation in their petition for why this Court should consider the question in this case. In fact, they fail to discuss the issue anywhere at all in the entirety of the petition, just as they failed to present this issue to the court below.

Fifth, the third question presented, regarding the appropriate statute of limitations, is equally unworthy of this Court's review. The Texas Supreme Court never passed upon the issue below and, contrary to Petitioners' suggestion, there is no split of authority among the state courts of last resort—or among any courts, for that matter—on this issue.

Sixth, there are alternative grounds for affirmance of the Texas Supreme Court's decision. Not only is there the statute of limitations issue, upon which the State's highest court has not yet passed, but there is a separate issue of whether Respondents can be held liable for the faxes at issue, which were transmitted by independent advertising companies on behalf of independent retailers. Accordingly, even if this Court were to reconsider each question presented, there is a strong possibility that this Court's decision would have no ultimate effect on the adjudication of rights between the parties in this case.

Finally, this Court should deny the petition because there is no error to correct. The Texas Supreme Court correctly interpreted the "if otherwise permitted" language of 47 U.S.C. § 227(b)(3) to require states to take some affirmative action to authorize parties to bring private TCPA claims in their courts, as did the Texas Legislature in 1999. Likewise, the Texas appellate court correctly interpreted the same TCPA section, in harmony with the federal residual statute of limitations section, 28 U.S.C. § 1658, to incorporate state statutes of limitations. For all of these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act

Before Congress enacted the TCPA in 1991, more than 40 States had some form of legislation in place that prohibited certain *intrastate* unsolicited telemarketing calls or unsolicited advertising via facsimile transmissions. S. Rep. No. 102-178,

at 3 (1991), *as reprinted in* 1999 U.S.C.C.A.N. 1968. The States had no authority, however, to prohibit or regulate similar conduct as to *interstate* calls and faxes.[1] *See, e.g.*, TCPA of 1991, Pub. L. No. 102-243, §2(7), 105 Stat. 2394 (Congress expressly finding that in the absence of federal regulation, state regulations of such conduct could be "evade[d] . . . through interstate operations"); S. Rep. No. 102-178, at 5 ("Federal action [wa]s necessary because States do not have jurisdiction to protect their citizens against those who use these machines to place interstate calls."). Accordingly, the States' ability to stem the tide of such unsolicited calls and faxes was quite limited.

To bridge this gap, Congress enacted the TCPA as "comprehensive telemarketing legislation" designed to reach unsolicited telemarketing calls and fax advertisements without regard to jurisdictional boundaries. 137 Cong. Rec. S18,317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler). The TCPA, thus, includes a series of nationally "uniform" prohibitions, *id.*, that proscribe certain unsolicited advertising contacts by means of interstate and intrastate communications alike. *See* 47 U.S.C. § 227(b)(1). As to unsolicited fax advertisements—the conduct allegedly at issue in this case—§ 227 specifically prohibits the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement," with certain exceptions. *Id.* § 227(b)(1)(C).

This prohibition, then, is given effect through several mechanisms prescribed by Congress. *First*, the Federal Communications Commission ("FCC") is authorized under the

---

1. As Senator Hollings, the sponsor of the Senate bill behind the TCPA explained, "[p]ursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted." 137 Cong. Rec. S18,784 (daily ed. Nov. 27, 1991).

TCPA to "prescribe regulations to implement the" statute's various prohibitions. *Id.* § 227(b)(2). As to the unsolicited fax prohibition, the TCPA permits the FCC to, for example, exempt certain types of "professional or trade associations" from some of the requirements. *Id.* § 227(b)(2)(F); *see also id.* § 227(d)(2) (requiring the FCC to revise regulations "setting [certain] technical and procedural standards for telephone facsimile machines" regarding the markings that identify the sender of the fax).

Second, the TCPA authorizes "the attorney general of a State, or an official or agency designated by a State . . . [to] bring a civil action on behalf of its residents," in federal court, to enforce the restrictions enumerated in the TCPA and accompanying regulations. *Id.* § 227(f)(1)-(2). Although the FCC is given the "right . . . to intervene in the action," "to be heard on all matters arising therein," and "to file petitions for appeal" in such cases, *id.* § 227(f)(3), it is left to the discretion of each State's agents to decide whether it will institute such enforcement actions in federal court, *id.* § 227(f)(1) ("[T]he State *may* bring a civil action." (emphasis added)).

Finally, the TCPA creates a private enforcement mechanism, which provides: "A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State" a "[p]rivate right of action" to enforce the prohibitions enumerated in the Act and the regulations promulgated pursuant thereto. *Id.* § 227(b)(3) (emphasis added). It is this provision, and specifically the meaning of the italicized clause regarding when a private actor may bring such a private right of action, that is at issue in this case.

B. Texas's Legislative Response to the TCPA

At the time Congress enacted the TCPA, Texas was one of the States that had taken affirmative steps to prohibit certain

unsolicited fax advertisements. In 1989, it had enacted a statute making it a Class C misdemeanor to advertise via unsolicited fax transmissions. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 783, § 1, 1989 Tex. Gen. Laws 3469, 3469 ("1989 Act") (current version at Tex. Bus. & Com. Code § 35.47(e) (Vernon 2002)). Texas had declined, however, to enact a civil corollary to this criminal statute or authorize private rights of action to enforce this statute.

It was not until 1999, eight years after Congress enacted the TCPA, that Texas amended the 1989 Act to authorize private parties to bring a private right of action in state court to enforce the restrictions enumerated in the Act. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 635, § 1, 1999 Tex. Gen. Laws 3203, 3203 ("1999 Act") (codified as amended at Tex. Bus. & Com. Code § 35.47(f) (Vernon 2002)). In the same provision, Texas expressly authorized persons in Texas to bring a private right of action in state court to enforce the TCPA. That is, under the newly amended Texas law, "[a] person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section [of Texas law] may bring an action against the person who originates the communication in a court of this state." Tex. Bus. & Com. Code § 35.47(f). No one in this case disputes that Texas, by enacting this provision, made clear its intention to permit private rights of action, as contemplated by 47 U.S.C. § 227(b)(3), to be brought in Texas state courts after September 1, 1999. *See* 1999 Act, § 3 ("This Act takes effect September 1, 1999").

C. The Unique History of this Case

This case arises out of Petitioners' claims regarding faxes that were allegedly sent in violation of the TCPA as far back as 1993. Three separate courts have now dismissed these claims on the merits.

1. The Claims in this Case as to GTE Were Originally Raised in Federal Court More than a Decade Ago.

In 1995, Petitioners filed suit against GTE and others in the United States District Court for the Southern District of Texas regarding faxes allegedly authorized to be sent by the defendants in violation of the TCPA. Pet. 30a. The district court dismissed all of Petitioners' TCPA claims on the merits. *See Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997) (explaining procedural posture).

On appeal, the U.S. Court of Appeals for the Fifth Circuit dismissed the case for lack of jurisdiction. *See id.* at 514. Although the court of appeals had no cause to determine whether Petitioners' claims could be brought in Texas state courts in particular, it did conclude that the federal courts lacked jurisdiction to hear such claims. *See id.* & n.1 (quoting the FCC as "indicat[ing] a consumer could 'file suit in state court (if your state permits such actions),'" but holding only that "Congress intended the state courts to have exclusive jurisdiction over private actions filed under the TCPA").

2. The Texas District Court Granted Summary Judgment to GTE on These Same Claims and to Chick-Fil-A.

Also in 1995, Petitioners filed a separate case in Harris County District Court in Texas, alleging that numerous parties violated the TCPA either directly by sending unsolicited faxes or indirectly by authorizing such faxes to be sent. Pet. 29a-30a. On March 11, 1998, after the U.S. Court of Appeals for the Fifth Circuit had dismissed the case brought in federal court against GTE and others, Petitioners amended the state court case to include GTE and, for the first time, sued Chick-Fil-A. *Id.* at 30a. The Harris County District Court dismissed Petitioners' case on the merits as to all defendants and granted

"in all things" GTE's and Chick-Fil-A's motions for summary judgment. *Id.* at 89a-92a (order granting summary judgment).

3. The Texas Court of Appeals Affirmed as to Chick-Fil-A and Remanded Certain of Petitioners' Claims Against GTE.

The Court of Appeals of Texas, Fourteenth District, Houston affirmed in part, and reversed and remanded in part. Pet. 26a (Texas Court of Appeals' decision). *First*, regarding all of the claims brought under the TCPA, the court of appeals rejected the argument that they were properly dismissed because they were brought before September 1, 1999, when Texas permitted for the first time private rights of action under the TCPA to be brought in its state courts. *Id.* at 52a. In so doing, the court declined to adopt the "opt-in" interpretation of the TCPA—and specifically the "if otherwise permitted" clause of 47 U.S.C. § 227(b)(3)—wherein parties are not authorized to bring a private right of action under the TCPA in a State's courts unless that state affirmatively authorizes such private rights of action. Pet. 52a-54a. It also rejected the "acknowledgment" interpretation advocated by Petitioners, wherein the "if otherwise permitted" language is rendered "doubly redundant." *Id.* at 53a. The court settled, instead, on an "opt-out" interpretation in which States are authorized under the "if otherwise permitted" clause to close their courts to private rights of action under the TCPA, but need take no affirmative action to permit such claims. *Id.* at 52a.

Second, the court of appeals affirmed the lower court's decision to dismiss the claims against Chick-Fil-A as time-barred on the ground that the conduct at issue occurred more than two years before suit was filed. *Id.* at 77a. The appellate court rejected Petitioners' argument that the federal residual four-year statute of limitations under 28 U.S.C. § 1658(a) applies to claims

brought under the TCPA in Texas state courts. As the court explained, "the four-year statute of limitations in section 1658(a) applies to the TCPA claims *unless another law provides otherwise*." *Id.* at 74a (emphasis added). Because the TCPA does provide otherwise by empowering each State to decide whether and under what circumstances to permit such claims to be brought in its state courts, the court reasoned, then the residual federal time limit under § 1658 is inapplicable. *Id.* at 74a-75a. Courts, therefore, should look to the particular State's law to determine the relevant statute of limitations. *Id.* Based on Texas Supreme Court precedent, the court of appeals then determined that the applicable state statute of limitations is two years and held that there was no dispute that the conduct at issue fell outside of this two-year bar. *Id.* at 75a-77a.[2]

Finally, the court of appeals reversed summary judgment on GTE's argument that it was not liable for the faxes transmitted by independently owned and operated advertisers and concluded that "there is a genuine issue of material fact as to whether the fax advertisements in question were sent by someone acting on behalf of GTE." *Id.* at 79a.[3]

4. The Texas Supreme Court Affirmed the Trial Court's Dismissal of All of the TCPA Claims.

The Texas Supreme Court reversed the lower court's decision on the central interpretation of the TCPA and held that

2. The court of appeals rejected GTE's argument that Petitioners' claims against it were time-barred, even under the court's holding that Texas's two-year statute of limitations applied. Pet. 77a-78a. This is because, "under Texas limitations law, the date of filing as to the claims against GTE . . . relate[d] back to April 12, 1995—the date the Recipients filed the Federal Suit against GTE." *Id.* at 78a.

3. *See also* Pet. 81a-82a (affirming in part and reversing in part summary judgment as to other defenses raised by GTE). Chick-Fil-A also asserted that the TCPA claims against it were barred by agency and independent contractor principles, but that issue was not reached as to Chick-Fil-A in light of the court's decision on limitations.

the "if otherwise permitted" clause of 47 U.S.C. § 227(b)(3) requires some affirmative action on the part of a state to enable parties to bring a private right of action under the TCPA in that state's courts. Pet. 20a-24a. At the outset, the Texas Supreme Court, as had the court of appeals, rejected the "acknowledgment" approach advocated by Petitioners on the principle ground that it rendered "certain language in the TCPA 'doubly redundant.'" *Id.* at 13a (citation omitted). As the court explained, there would have been no reason for Congress to "acknowledge" the background principle that, as to traditional federal statutory private rights of action, state courts of general jurisdiction are presumed to have jurisdiction to hear such claims unless Congress decides otherwise. *Id.* Moreover, because "Congress did choose to acknowledge this general principle elsewhere in the TCPA by stating that suit may be brought 'in an appropriate court of that State,'" *id.* (quoting § 227(b)(3)), "[i]nterpreting the 'if otherwise permitted' provision to have the same meaning 'would be redundant and risk rendering the words meaningless,'" *id.* (citation omitted).

The Texas Supreme Court next rejected the "opt-out" approach adopted by the court of appeals as merely an attempt by the lower court to "give a nod to *Supremacy Clause* concerns" where no such concerns are "implicated at all." *Id.* at 17a. As the supreme court explained, "giving effect to the ['if otherwise permitted'] proviso that Congress created," whether that be through the "opt-out" *or* the "opt-in" interpretation, "cannot run afoul of the *Supremacy Clause*." *Id.*

The supreme court similarly dismissed the lower court's suggestion that only the "opt-out" approach would further Congress's purpose in enacting the TCPA. Because "[t]he principal motivation behind" Congress's creation of the TCPA's private right of action was "'solicitude for states which were thwarted in their attempts to stop unwanted telemarketing,'" *id.* at 19a (citation omitted), and because "Congress recognized

the potential burden on state courts these [private rights of action] could present," *id.* at 18a, the court determined that "[t]here is strong evidence that Congress wanted to assist state regulation in reaching interstate communications *if a state so desired*," *id.* at 19a (emphasis added). Congress did not intend automatically "to create an independent regulatory framework for a potential flood of individual state-court lawsuits." *Id.*

The Texas Supreme Court then re-focused the question of interpretation on the text of the statute and, in particular, the terms "otherwise permitted." *Id.* at 20a. After analyzing the dictionary definitions of the words "otherwise" and "permit," the court reasoned that "[u]se of the words 'otherwise permitted,' then, suggests the necessity of affirmative state action to activate the TCPA's private cause of action." *Id.* at 20a-21a. The court found further support for this interpretation of the plain language in the "[c]ongressional intent underlying the TCPA" to grant "significant" and "deliberate" "deference to states, allowing them to determine whether to entertain the private TCPA claims that Congress decided to make exclusively actionable in state court." *Id.* at 21a-22a.

Finally, the supreme court applied its interpretation of the TCPA's private right of action provision—to require affirmative state action to permit a private right of action under the TCPA to be brought in its courts—to the facts of this case. "[B]ecause Texas did not otherwise permit a cause of action for the receipt of unsolicited fax advertisements until September 1, 1999," the court explained, "and the faxes at issue in this case were sent before that date, plaintiffs have no actionable claim." *Id.* at 25a. Furthermore, "[b]ecause this conclusion [wa]s dispositive," the court "d[id] not reach the parties' other arguments involving the limitations period applicable to TCPA claims and the application of Texas agency law under the facts presented here." *Id.*

REASONS FOR DENYING THE PETITION

I. Even If the Texas Courts Erred, this Case Is a Poor Vehicle for this Court's Review of the Questions Presented at this Time.

Even assuming *arguendo* that the questions presented in the petition involve issues with merit *and* that the lower courts erred in their decisions, there is nothing about this case that makes it worthy of this Court's review.

A. As Petitioners Themselves Conceded Before the Texas Supreme Court, the Unique Circumstances of this Case Are Not Likely Ever To Recur.

Because the unique circumstances of this case are not likely ever to recur, there is no reason for this Court to consider and decide the first issue Petitioners present in the context of this case. That is, the class of cases in Texas affected by the Texas Supreme Court's decision on the first issue presented is a class of one, including only Petitioners' case. This is because there is no question that the Texas Legislature has amended its laws expressly to allow parties to bring suit in Texas courts for violations of the TCPA. Pet. 2a. Since Septe[illegible]er 1, 1999, any party that has received an unsolicited fax in the State of Texas has had available to it a private right of action under the TCPA enforceable in state court. Accordingly, as of September 1, 1999, it matters not at all in the State of Texas that the Texas Supreme Court interprets the TCPA as requiring affirmative state action to execute the private right of action provision—the State of Texas has taken this affirmative step and offers all of its citizens recourse under the TCPA in its courts.

The issue of whether the TCPA's private right of action provision has independent force arose in the context of this case only because the conduct at issue allegedly took place beginning in 1993, well before the Texas Legislature enacted legislation authorizing suit in state courts under the TCPA. And, the case

against GTE has survived as long as it has only because the Texas court of appeals held that the time for filing suit in state court related back to Respondents' initial filing of the same suit in federal court in 1995. *See supra* note 2.

Petitioners breathe not a word about this timing anomaly in their petition—and for good reason—because this Court should have no interest in granting their petition where a final decision on the merits would have no effect on other parties in Texas. Indeed, Petitioners have engaged in a full retreat from their own statements before the Texas Supreme Court urging that court not to consider what Petitioners themselves called an "issue *unimportant* to Texas jurisprudence." *See* Chair King Br. 22 ("[B]ecause 28 U.S.C. § 1658 . . . provides a four-year limitations period, limitations would bar any TCPA claim accruing before 1999 that has not already been filed, making GTE's opt-in issue *unimportant to Texas jurisprudence.*" (emphasis added)). That is, Petitioners conceded below that "the opt-in *issue is no longer important* to cases filed in the last five years. . . ." *Id.* (emphasis added). Quite simply, the class of parties to which Petitioners belong, with the exception of Petitioners, is now a null set. There is, therefore, no reason to consider the questions presented under the circumstances of this case.

B. Respondents Are Aware of No State in Which Fax Recipients Are Barred from Bringing the Private Right of Action Permitted Under the TCPA.

Despite Petitioners' best efforts to suggest that the Texas Supreme Court's decision has somehow undermined legislative intent, Pet. 14-15, they have pointed to no other parties anywhere in the United States, and not just in Texas, that will be affected by the Texas Supreme Court's decision. Even taking Petitioners' alleged split of authority at face value—which must be heavily discounted upon closer examination, *see infra* Part I.C.—it is clear that no other jurisdiction requires a state legislature to

take an affirmative step to execute the private right of action under the TCPA within state courts. Pet. 8-10. And, even as to those jurisdictions where courts have held that a state could, theoretically, choose to exclude such actions from being brought in their courts, Petitioners have identified no State where the legislature has taken such a step to negate the effect of the TCPA's private right of action provision. *See* Pet. 15a (Texas Supreme Court explaining that "[o]f the courts that follow the 'opt-out' position, none has yet determined that a state has actually opted out of providing a forum for private TCPA claims."). Accordingly, Petitioners can identify no other parties anywhere in the country that are currently prevented from bringing a private right of action under the TCPA in their respective state courts.

Nor, of course, is there any reason to believe that if a future state court were to adopt the approach of the Texas Supreme Court, the relevant state legislature would fail to respond expeditiously, and follow the course chosen by the Texas Legislature, to affirmatively execute the private right of action under the TCPA within its borders.[4] Whatever the reaction of future courts and future legislatures may be, therefore, it is clear that any concern about other parties' inability to raise a TCPA claim in any state court is wholly premature and does not support the petition.

C. The Split of Authority Is Shallow and Lopsided, and Without Consequence for the Jurisdictions Implicated.

Petitioners would have this Court believe there is a fulsome 7-7-1 split of authority on the first question presented, with

4. Indeed, the Texas Legislature took this step almost immediately following a decision of a Texas district court dismissing a suit under the TCPA, where the defendant argued that "Texas had not authorized private enforcement of the TCPA when the violations occurred." *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 16 S.W.3d 815, 816 (Tex. App.—Fort Worth 2000, pet. denied) (discussing lower court decision).

numerous state and federal courts taking profoundly divergent views on the interpretation of the TCPA's private right of action provision. Pet. 8-10. As explained above, even if there were such a split of authority, no other unsolicited fax recipients in the United States are affected by it, and so any split of authority is quite beside the point as to the availability of private enforcement under the TCPA. When the surface is scratched, moreover, it is clear that there is nothing on the order of a 7-7-1 split, and even taking the split in the best light for Petitioners, it is lopsided and unworthy of this Court's consideration.

First, there is, at most, a 4-1 split of authority among *state courts of last resort* (and federal courts of appeals),[5] with four state courts of last resort having adopted what some characterize as the "opt-out" or "acknowledgement" approaches, and the Texas Supreme Court adopting the so-called "opt-in" approach. *See Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004) ("opt-out"); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002) (same); *Edwards v. Direct Access, L.L.C.*, 124 P.3d 1158 (Nev. 2005) (same). Only one state court of last resort or federal court of appeals has adopted the "acknowledgement" approach. *See R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 857 A.2d 1 (Md. 2004). And, the only federal court of appeals to address the issue has done so in *dicta*. *See Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns*, 329 F. Supp. 2d 789, 800 (M.D. La. 2004) ("[*D*]*icta* from [*Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997)] suggests that an 'opt-out' approach is the correct interpretation of the private right of action provision of the TCPA."). The shallow nature of this split counsels strongly

5. The majority of federal courts to have considered the issue have held that, although federal courts have exclusive jurisdiction over TCPA enforcement actions brought by state attorneys general and the FCC, federal courts have no jurisdiction to hear private rights of action under the TCPA. Pet. 3a The question whether federal courts have jurisdiction to hear private TCPA claims is not at issue in this case.

against this Court's consideration of the questions presented at this time.

Second, even if one were to credit the decisions of trial and intermediate courts (and *dicta*) as settled issues of law in their respective jurisdictions, purely for the sake of argument, the result is a severely lopsided 14-1 split of authority in which the Texas Supreme Court's decision is the outlier. This is because, as explained above, there is no practical difference between the acknowledgement and opt-out approaches, as Petitioners have pointed to no decision where a state was found to have opted out. *See supra* Part I.B. Such a lopsided split is grounds for denying a petition under any circumstances. Where, as here, even in the outlier jurisdiction, no parties other than Petitioners are affected by that court's decision, there can be no question that this case has none of the earmarks required to warrant the expenditure of this Court's valuable resources.

D. Petitioners Provide No Grounds for Granting the Second Question and Raise It for the First Time in Their Petition to this Court.

Petitioners' second question presented promises an issue that raises "delegation" concerns under "the Supremacy Clause," "the Tenth Amendment," and "modern notions of federalism," Pet. *i*, but the petition fails entirely to deliver. Indeed, Petitioners reference the concept of "delegation" only once in their petition, in the introductory paragraph to their argument section and without explanation. *Id.* at 7. Instead, in the few pages they devote to the statutory provision at issue, they focus exclusively on the concept of *state courts' obligation* to hear traditional federal private rights of action, *id.* at 12-13, and at no time discuss the concept of *congressional authority* to delegate to state legislatures decisions about whether a private right of action will be enforceable.

It is not surprising that Petitioners have failed to supply this Court with any reason to grant the second question presented, as they never presented, let alone developed, this argument below. Thus, even if this question were an interesting one over which state courts of last resort and federal courts of appeals were sharply divided—a position Petitioners do not even attempt to advance in their petition—it is not one properly presented to this Court.

E. For Several Reasons, the Third Question Presented Is Also Not Worthy of this Court's Review.

Petitioners also attempt to squeeze in a third question presented, regarding which statute of limitations applies to claims brought under the TCPA in Texas courts, that similarly presents vehicle problems in this case and bears none of the attributes of a question worthy of this Court's review. *First*, the statute of limitations question was never passed upon by the Texas Supreme Court. Its decision on the unavailability of TCPA actions in Texas courts before 1999 rendered the limitations issue moot. Pet. 25a. There is, therefore, no well-reasoned, or indeed any, decision from the highest state court on the limitations issue, and any review by this Court of this question would be premature.

Second, despite Petitioners' contention, Pet. 21, there is no conflict among the state courts of last resort on the limitations issue. Of the three States whose courts have considered the issue according to Petitioners, *id.*, only one, Nevada, has had its high court rule on the issue. *See Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280 (Nev. 2006). Moreover, contrary to the statements in the petition, the Nevada Supreme Court ruled similarly to the Texas court of appeals here, and held that TCPA claims are governed by Nevada's two-year statute of limitations, not the federal residual statute of limitations. *Id.* at 1286-87; Pet. 21 (incorrectly citing *Edwards* for the proposition that the federal statute of limitations applies to TCPA claims). Indeed, the

Nevada Supreme Court's decision closely followed the analysis of the court of appeals in this case. *Edwards*, 130 P.3d at 1286-87.

Moreover, the only case cited by Petitioners in which a court applied the federal four-year period, a New Jersey superior court decision, acknowledges that § 1658 would not apply if a shorter period existed under state law. *See Zelma v. Konikow*, 879 A.2d 1185, 1190 (N.J. Super. Ct. App. Div. 2005). Because there is no genuine conflict among the state courts—much less a conflict among state courts of last resort—there is simply no reason for this Court to consider the limitations issue at this time.

F. There Are Alternative Grounds for Affirmance of the Texas Supreme Court's Decision.

Because it determined that Petitioners could not state a claim under the TCPA in Texas prior to September 1, 1999, the Texas Supreme Court also did not need to consider the alternative grounds under which Petitioners' claims could be dismissed. Pet. 25a. There is little doubt that the Texas Supreme Court would find in Respondents' favor under these alternative theories. For example, as explained above, the Texas Supreme Court did not reach the limitations issue on which the Texas appellate court correctly held that the claims against Chick-Fil-A were time-barred under Texas's two-year statute of limitations. And, as both GTE and Chick-Fil-A argued before the Texas Supreme Court, the trial court properly granted summary judgment in their favor because they were not liable for the faxes at issue, which were transmitted by independent advertising companies on behalf of independent retailers.[6] This is simply not a case in which this Court's reconsideration would

6. In fact, Petitioners sued and settled with the independent advertising companies allegedly responsible for the faxes at issue early in the history of this case.

necessarily, or even likely, have any ultimate effect on the adjudication of rights between the parties.

II. The Court Below Correctly Interpreted the TCPA as Respecting Each State's Decision Whether To Permit a Private Right of Action To Be Brought in Its Courts.

In any event, this Court should deny the petition because the Texas Supreme Court correctly interpreted the TCPA to rely on the States to decide whether to permit private rights of action regarding unsolicited faxes to be raised in their courts.

A. The Plain Terms, Purpose, and History of the TCPA All Make Clear that It Conditions the Availability of a Private Right of Action on State Action.

Nowhere in the single sentence Petitioners devote to the language of 47 U.S.C. § 227(b)(3) do they attempt to address the meaning of the actual terms employed by Congress. Pet. 13. Instead, they simply import an inapt standard that the language be "unmistakably clear" and then summarily conclude that it is not. *Id.*; *see infra* Part II.B.1. If one actively engages the language, however, it *is* clear that § 227(b)(3), by its plain terms, conditions the availability of the TCPA's private right of action in any particular State on that State's decision whether to permit it. This understanding is bolstered by Congress's purpose in enacting the TCPA—to empower those States who desire to take action to reach interstate conduct.

First, the Texas Supreme Court properly "beg[an] with the text of the statutory proviso," Pet. 20a, which, in context, states: "A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that state" a private right of action "based on a violation of" the TCPA, 47 U.S.C. § 227(b)(3) (emphasis added). It is unmistakably clear that the term "if" signals a clause that creates a condition precedent which must be satisfied before the remainder of the provision can take effect. *See, e.g.*, Merriam-

Webster's Collegiate Dictionary 575 (10th ed. 2001) (defining "if" to mean, *inter alia*, "in the event that" and "on condition that"); *Adirondack Transit Lines, Inc. v. United Transp. Union*, 305 F.3d 82, 87 (2d Cir. 2002) ("If" is "a small word with large legal significance. . . . we agree . . . that this language creates an express condition precedent. . . " (citing 13 Richard A. Lord, Williston on Contracts § 38:16 (4th ed. 2000))); *see also* Black's Law Dictionary 746 (6th ed. 1990) ("In deeds and wills, this word, as a rule, implies a condition precedent . . . .").

With this logical connector in place, the court thus focused on the key terms "otherwise permitted" to determine how the condition is to be satisfied:

> The term "otherwise" denotes "(1) in a different way or manner: DIFFERENTLY; (2) in different circumstances: under other conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). And "permit" is defined as "(1) to consent to expressly or formally: grant leave for or the privilege of: ALLOW, TOLERATE; (2) to give (a person) leave: AUTHORIZE; . . . (4) to make possible." *Id.*

Pet. 20a-21a. "Use of the words 'otherwise permitted,' then," according to the court, "suggests the necessity of affirmative state action to activate the TCPA's private cause of action." *Id.* at 21a. That is, the condition that must be satisfied in order for a party to have available to it the private right of action contemplated by § 227(b)(3) is the presence of a separate and distinct state consent or authorization permitting the action to be brought in the state's courts.

Second, the purpose of the TCPA also supports this reading of § 227(b)(3), which defers to the States to decide whether to entertain such actions in their courts. As explained above, while most States had taken an active role in protecting their citizens against certain unsolicited *intrastate* phone calls and/or faxes

before 1991, they lacked authority under federal law to reach *interstate* phone calls and faxes. *See supra* pp. 3-4. There is no question, therefore, that one of the primary purposes motivating Congress's enactment of the TCPA was to supplement the efforts of the more than 40 States that had already passed laws prohibiting such conduct by extending the restrictions to certain interstate phone calls and faxes. *See id.*

Nonetheless, Congress "was surely conscious that," if it were to enact a self-executing private right of action under the TCPA, "state courts could suddenly be burdened with a potential flood of unsolicited-fax suits." Pet. 21a. Accordingly, although Congress adopted a uniform federal prohibition on the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" that applies to intrastate and interstate faxes alike, 47 U.S.C. § 227(b)(1)(C), *and* authorized state attorneys general to bring enforcement actions in the federal courts, *id.* § 227(f), it is not at all strange that Congress would have deferred to each State to decide whether additionally to permit private suits to be brought in its courts. Indeed, it makes perfect sense that, given both its desire to aid the States in combating unsolicited telephone calls and faxes and its recognition that private rights of action could flood the courts, Congress would defer to the States on whether to activate this tool of enforcement under the TCPA. *Cf. Int'l Sci. & Tech. Inst.*, 106 F.3d at 1157 ("Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing transmissions were illegal under the TCPA.").

Finally, the legislative history lends further support to the Texas Supreme Court's reading of the TCPA's private right of action provision. When Senator Hollings "introduced the

substitute bill containing the private right of action eventually codified at 47 U.S.C. § 227(b)(3)," Pet. 11a, he explained what he saw as the virtues of permitting consumers to bring their own actions under the TCPA, 137 Cong. Rec. S16,205-06 (daily ed. Nov. 7, 1991) ("Sen. Hollings's Statement"). He did not, however, suggest that such actions would automatically be permissible with the enactment of the provision at issue. On the contrary, he expressed his "hope that States will make it as easy as possible for consumers to bring such actions," and urged "States [to] act reasonably in permitting their citizens to go to court to enforce this bill." *Id.* Quite simply, there would have been no reason for him to urge such state action if he believed that none was required. Thus, because the plain text, the purpose, and the history of the TCPA all support the Texas Supreme Court's interpretation, there is simply no reason for this Court to reconsider the issue.

B. Petitioners' Arguments to the Contrary Are Unavailing.

None of Petitioners' scanty arguments regarding the Texas Supreme Court's interpretation of the TCPA's private right of action provision is persuasive.

1. The Presumption in Favor of Concurrent State Court Jurisdiction Is Not Applicable Here.

Petitioners' only attempt at interpreting the statutory language at issue rests solely on the flawed premise that this case implicates the considerations at issue in *Tafflin v. Levitt*, 493 U.S. 455 (1990). Pet. 12. It is no surprise that Petitioners fail to identify the presumption actually at work in *Tafflin*—"the presumption in favor of concurrent state court jurisdiction," *Tafflin*, 493 U.S. at 459—because to state the presumption is to reveal its inapplicability. This case, and the statutory provision at issue, does not present the question whether state courts have *concurrent jurisdiction* to hear a traditional federal private right

of action. The statute makes clear that *if* the private right of action is otherwise made enforceable or activated by the State, Congress intended for state courts to have jurisdiction over such claims. *See* 47 U.S.C. § 227(b)(3) ("A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate *court of that State*" a private right of action. (emphasis added)). Indeed, the majority of the courts to have considered the question have determined that state courts have *exclusive jurisdiction* over such claims. *See supra* n.5.

The question in this case is instead whether the "if otherwise permitted" clause requires some form of consent from the State before the private right of action is activated and available at all, in any court. As to this question, the presumption embodied in *Tafflin*, *Testa v. Katt*, 330 U.S. 386 (1947), and the other cases cited by Petitioners, Pet. 12, is wholly inapplicable.[7] *See* Pet. 9a-10a. Because Petitioners make no attempt to interpret the statutory language on its own, and not simply within the context of an inapt "unmistakably clear" standard, *id.* at 13, they have failed to present to this Court any viable argument that the Texas Supreme Court's interpretation was in error.

2. Neither of Petitioners' Alternative Readings of the Statutory Language at Issue Is Convincing.

Apparently Petitioners themselves have not yet settled on what they believe to be the correct interpretation of the statutory provision at issue. Although they assert that any reading that would empower "state legislatures . . . to decide whether their courts will entertain TCPA claims"— presumably including both the "opt-in" *and* "opt-out" interpretations—"raises serious Supremacy Clause and federalism concerns," they concede that

7. Even if such a presumption did apply, however, the plain text, purpose, and history of the TCPA all support an unmistakably clear reading that the State's affirmative consent is required before the TCPA's private right of action can be enforceable in the state's courts. *See supra* Part II.A.

they "argued in favor of" *both* "the acknowledgement" *and* the "opt-out" theories in the court below. Pet. 7-8. They, thus, make no attempt to offer a single coherent reading of the statute and instead embrace only the notion that § 227(b)(3) means anything other than the interpretation adopted by the Texas Supreme Court.

Nor could they offer such an alternative coherent reading of the statute. As the Texas Supreme Court explained, the "acknowledgement" approach suffers from a critical interpretive infirmity—it violates the cardinal canon of construction directing that every word of a statute be given meaning.[8] That is, under the "acknowledgement" theory, the "if otherwise permitted" clause merely "acknowledges" what Supreme Court precedent already requires, namely the "general rule that a state may not decline to enforce a federal cause of action," Pet. 9a, and recognition of "states' rights to structure their court systems," *id.* at 11a. Under this reading, however, the clause has no independent force or purpose. Petitioners also cannot explain why Congress would have redundantly clarified that such claims were to be brought "in an appropriate court of that State." 47 U.S.C. § 227(b)(3). As the court below explained, such a "[f]ailure to give" independent "effect to the statutory proviso would itself run the risk of violating the *Supremacy Clause* by refusing to apply the federal right as written." Pet. 11a.

The "opt-out" theory fares no better as it appears merely to provide an unsubstantiated halfway point between the flawed "acknowledgement" theory and the "opt-in" interpretation,

---

8. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . [T]his rule [is] a cardinal principle of statutory construction. . . . [A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant[.]" (internal quotations omitted) (citations omitted)).

which is fully supported by the "otherwise permitted" language. *See supra* Part II.A; Pet. 17a-20a. Although the "opt-out" theory has the benefit over the "acknowledgement" approach of giving force and effect to the statutory proviso by accepting that States have a role to play in determining whether the TCPA private right of action will be enforceable in their courts, it fails to give full force and effect to the word "permitted," which, as the Texas Supreme Court held, requires *affirmative* consent or authorization. *See supra* Part II.A. It likewise fails to explain why Senator Hollings would find it necessary to urge the States affirmatively to "*make it* as easy as possible for consumers to bring such actions" and *to* "*act* reasonably in permitting their citizens to go to court to enforce this bill." Sen. Hollings's Statement at S16,205-06 (emphases added). Because Petitioners fail genuinely to advance either alternative reading of § 227(b)(3), and neither reading is coherent in any event, there is no reason for this Court to reconsider the Texas Supreme Court's sound interpretation at their behest.

3. Petitioners Also Fail To Recognize that the TCPA Is Enforceable Through Other Means Regardless of the Availability of Private Actions in a State's Courts.

Finally, it is clear that much of Petitioners' failure to grasp how the TCPA's private right of action provision was intended to work is based on their refusal to recognize how the TCPA is structured. Much of Petitioners' argument is based on the faulty premise that, under the "opt-in" approach, if a state fails to act, then there is no enforceable federal prohibition. *See, e.g.*, Pet. 14 ("[I]f there is no federal question jurisdiction and no state is obliged to hear such claims, the only way TCPA claims could be heard would be as claims asserting federal diversity jurisdiction."); *id.* (assuming that if states did not pass "'enabling' legislation," there is "no restriction at all" under the TCPA). As explained above, however, the TCPA includes a

uniform federal prohibition against certain conduct, 47 U.S.C. § 227(b)(1), that can be enforced by states attorneys general in federal court and on behalf of their residents, *id.* § 227(f), separate and apart from any private right of action contemplated under § 227(b)(3).[9] Thus, the TCPA's prohibition is fully operational and binding on all parties throughout the United States, and the TCPA is in no way "render[ed] . . . meaningless," under the Texas Supreme Court's interpretation of § 227(b)(3).

III. The Texas Intermediate Court Correctly Applied the Texas Two-Year Limitations Period to the Claims at Issue.

This Court should also deny the petition because the Texas Court of Appeals correctly interpreted the TCPA to incorporate Texas's two-year statute of limitations as to private TCPA actions brought in Texas state courts. On the limitations issue, as with the question whether TCPA claims were available at all in Texas courts before 1999, Petitioners engage in an enterprise of selective interpretation without making any attempt to harmonize *all* of the language of the federal residual limitations provision, 28 U.S.C. § 1658, with the TCPA provision at issue.

---

9. Equally unavailing is petitioners' argument that 47 U.S.C. § 227(e) precludes an "opt-in" interpretation. Pet. 14. Section 227(e) by its terms and in context simply makes clear that, although any state restrictions on unsolicited *interstate* faxes are obviously preempted, states are not expressly prohibited from "impos[ing] more restrictive *intrastate* requirements or regulations" under the circumstances prescribed. *Id.* § 227(e)(1) (emphasis added). Because the TCPA's uniform federal prohibition is unaffected by any portion of the private right of action provision, a state's failure to act under § 227(b)(3) does not negate that uniform federal prohibition or preclude its enforcement by state attorneys general in federal court. In other words, a state could decide to impose "no restriction at all," and decline to activate the private right of action, without in any way "rendering § 227(e) meaningless" or defeating the purpose of the TCPA. Pet. 14.

Petitioners' theory is simple: "the TCPA is a federal law, was enacted after § 1658 [was enacted], and has no limitations period"; *ergo*, the residual four-year limitations period of § 1658 applies to claims brought under the TCPA. Pet. 16. This oversimplification, however, contains two fundamental flaws. First, it reads the first and most critical clause directly out of § 1658. Section 1658 provides:

> (a) *Except as otherwise provided by law*, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

Id. (emphasis added). It is this first condition in § 1658 that makes it "residual" and renders it a provision of last resort. Only where no other federal law provides for another mechanism of incorporating a different statute of limitations does § 1658 serve any purpose at all. Thus the court of appeals correctly concluded that the federal residual limitations period applies "unless another law provides otherwise." Pet. 74a-75a.

Second, Petitioners then refuse entirely to inquire whether any law does otherwise provide. Indeed, just as they fail to engage the TCPA's language to determine the availability of private rights of action in Texas state courts before 1999, Petitioners similarly ignore the TCPA's text in determining whether the default limitations period of § 1658 applies. As the Texas Court of Appeals explained, the TCPA does "otherwise provide[]" because the TCPA allows the pursuit of private claims in state court only if state law permits it. Pet. 74a-75a (citing 47 U.S.C. § 227(b)(3)).[10] That is, although the private right of

10. Although the appellate court did correctly determine that the "if otherwise permitted" language incorporates state statutes of limitations, the Texas Supreme Court also correctly determined that this same language further requires the States to take affirmative action

(Cont'd)

action provision in the TCPA does not include an express statute of limitations, labeled as such, its "if otherwise permitted" clause incorporates all applicable state laws into defining when such an action will be available in the state courts. Because, under Texas law, such claims cannot be brought in state court outside of a two-year limitations period, such claims are not "otherwise permitted" to be brought. This reading of § 1658 and the TCPA together is the only way to harmonize all of the language of both statutes.

Moreover, this reading is further supported by the history and purpose of the TCPA. As explained above, this federal legislation was necessary because the individual States had no authority to regulate interstate fax activity. *See supra* pp. 3-4; Pet. 6a. "Thus, although Congress created the private TCPA action, it was from the beginning a cause of action in the states' interest." *Aronson v. Fax.com, Inc.*, 51 Pa. D. & C.4th 421, 426 (C.P. 2001). In fact, Petitioners do not dispute that, to this end, Congress expected private rights of action to be brought in state courts. *See* Sen. Hollings's Statement at S16,204-06 ("The provision would allow consumers to bring an action in State court against any entity that violates the bill."); *id.* at S16,205 ("[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court."). It is no surprise, therefore, that Congress would have deferred to the States to determine *when* such actions could be brought in their courts.

Petitioners' arguments to the contrary are unavailing. For example, they cite this Court's decision in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), as support for their argument that § 1658 has a broad application and therefore governs TCPA claims. Pet. 19-20. In *Jones*, however, this Court addressed the limitations provision for claims arising under

(Cont'd)
to enable such suits to be brought in their courts at any time. *See supra* Part II.A.

42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991. 541 U.S. at 371-72. Section 1981 includes no provision comparable to the "if otherwise permitted" language of the TCPA. *Jones* dealt instead simply with claims over which federal courts have subject matter jurisdiction, not private TCPA claims over which federal courts do not have subject matter jurisdiction and the States determine whether the action is available in their courts. *See Jones*, 541 U.S. at 378 (discussing only federal claims within the subject matter jurisdiction of federal courts).[11]

Although they do not challenge the fact that the States have the power to structure their courts as necessary to administer TCPA claims, Petitioners nevertheless maintain that TCPA claims fall under the federal limitations period because state attorneys general may enforce the TCPA on behalf of their citizens in federal court. Pet. 20. If anything, the fact that Congress separately authorized certain actions to be brought in federal court (i.e., attorney general actions and certain FCC actions) suggests that *private claims* are to be treated differently, and just as Congress provided—as state actions to be brought in state court. When Congress wanted to provide federal jurisdiction for TCPA claims, it did so expressly. *See* 47 U.S.C. § 227(f)(2). With respect to private actions, however, Congress was clear in its intent—it expected private actions to be brought in state courts—and only "if otherwise permitted" in such courts. 47 U.S.C. § 227(b)(3), § 227(c)(5). Quite simply, Congress created different mechanisms for enforcement of the TCPA and assigned different limitations and parameters to each mechanism. Even if one assumes that § 1658's residual period applies to attorney general and FCC actions, there is every reason to believe, based on the structure and language of the TCPA,

11. For this same reason, Petitioners' arguments concerning the complexities of borrowing state limitations periods for federal claims over which federal courts have jurisdiction are irrelevant. Pet. 16-21.

that they intended for state limitations periods to apply to private actions brought in state courts.[12]

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for writ of certiorari should be denied. If this Court grants the petition, it should adopt the counter-questions presented.

Respectfully submitted,

GEOFFREY H. BRACKEN
KIMBERLY R. PHILLIPS
GARDERE WYNNE SEWELL LLP
1000 Louisiana,
Suite 3400
Houston, TX 77002
(713) 276-5576

Counsel for Chick-Fil-A, Inc.

KATHRYN COMERFORD TODD
Counsel of Record
MEGAN L. BROWN
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

JOE A. GARZA, JR.
VERIZON COMMUNICATIONS
1515 North Court House Road
Suite 500
Arlington, VA 22201
(703) 351-3146

Counsel for GTE Mobilnet of Houston, Inc.

12. Petitioners also contend that Congress did not remove federal diversity jurisdiction when it enacted the TCPA. Pet. 19 (citing *Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm., L.P.*, 329 F. Supp. 2d 789 (M.D. La. 2004)). This argument is another red herring as Petitioners do no more than pose a hypothetical factual scenario where they believe § 1658 might apply. This case does not meet the factual parameters of Petitioners' hypothetical. Here, the lower courts were not faced with an issue of federal diversity jurisdiction, so whether diversity jurisdiction lies in a TCPA claim is an issue that is not before this Court.

APPENDIX

APPENDIX A

47 U.S.C. § 227*

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

---

* Although this section was amended in 2005, *see* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359, § 227(b)(3) was unaffected. The full text of the current § 227 is included for the convenience of the Court.

Appendix A

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

Appendix A

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

Appendix A

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

Appendix A

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business

senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (a) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements

that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers

who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

Appendix A

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

Appendix A

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

Appendix A

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Appendix A

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

Appendix A

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

Appendix A

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

Appendix A

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

Appendix A

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

Appendix A

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

Appendix A

(g) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to *section 503* of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

APPENDIX B

28 U.S.C. § 1658

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.